HIGHLANDS & LOWLANDS BHD.

v.

SEE HO ENTERPRISE SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[CIVIL SUIT NO. 612 OF 1976]
24 DECEMBER 1986

LAND LAW: *Dispute regarding the boundary of land sold - Whether the agreement was to buy "jungle reserve land" or 260 acres - Whether Court has power to rectify title deed under s. 340 of the National Land Code - Whether s. 30 of the Specific Relief Act applicable.*

In 1968, the defendants had entered into an agreement with the plaintiffs to purchase "jungle reserve land" or approximately 260 acres being part of Lot 1203 at Bukit Jelutung Estate at a purchase price of RM1,550 per acre. 323 acres of Lot 1203 is Jungle Reserve, meaning an unplanted area and the rest of the lot has been under oil palm cultivation, the latter being divided into fields, one of which is known as Field G. Following a surveyor's report in 1971, it was found that by excluding 16.8 acres of the planted area of Field G, the Jungle Reserve was in fact a little more than 240 acres. The plaintiffs contended that what was bought was the Jungle Reserve but the defendants contended that what was sold was 260 acres.

The defendants further contended that the Court did not have the power to order the rectification of the title deed issued to the defendants by the excission therefrom of that part of Field G to the extent of 16.8 acres by virtue of s. 340 of the National Land Code ("the NLC"). The reasons being (1) the title of the defendants to the subject land is indefeasible; (2) the exceptions to that section do not apply to the facts of this case and (3) s. 30 of the Specific Relief Act ("the SRA") cannot override s. 340 of the NLC.

Held:

[1] Both parties were under the mistaken belief that the Jungle Reserve was 260 acres when it was in fact a little more than 240 acres, thus the intention of the parties was a sale and purchase of the unplanted area and not a sale and purchase of 260 acres of land.

[2] (a) The exceptions to s. 340 of the NLC do not apply to the facts of this case. However, mutual mistake is a ground for rectification of any instrument in writing under s. 30 of the SRA. Here there was mutual mistake with regard to the intention of the parties in the sale and purchase agreement.

(b) Indefeasibility of title under s. 340 of the NLC does not oust the remedy under s. 30 of the SRA. (*Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159 followed).

(c) The defendants are innocent purchasers for valuable consideration which would entitle them to the protection of s. 340 of the NLC.

[Claim for damages and counterclaim dismissed. Each party to pay its own costs.]

Cases referred to:
Oh Hiam & Ors. v. Tham Kong [1967] 1 MLJ 65
Tham Kong v. Oh Hiam & Ors. [1968] 1 MLJ 44
Oh Hiam & Ors. v. Tham Kong [1980] 2 MLJ 159

Legislation referred to:
National Land Code 1965, s. 340 (Old s. 42), 340(3)
Specific Relief Act 1950, s. 30

For the plaintiffs - S.D.K. Peddie; M/s. Skrine & Co.
For the defendants - Wong Weng Kwai; M/s. Mah-Kok & Din

JUDGMENT

Harun J:

Lim Low was a speculator in land. In May 1968 he met Muthu (whose present whereabouts are unknown) in a coffee-shop and was told that a portion of Bukit Jelutung Estate could be purchased. He was interested and wrote to the owners offering them to purchase the land at a price of RM1,550 per acre. This letter was returned to him and he wrote another letter on the same day (17 May 1968) offering to purchase "jungle reserve land" of approximately 260 acres being part of Bukit Jelutung Estate at a purchase price of:

20 acres of highland	-	RM160,000
240 acres of swamp land	-	RM243,000
		RM403,000

which is equivalent to RM1,550 per acre overall.

The owners accepted the offer. Lim Low paid a deposit of 10% of the purchase price after which he did not have sufficient funds to complete the purchase. He brought in Lim Tan & Sons. On 26 June 1968, the owners (Highlands Malaya Plantations Ltd. predecessors of the plaintiffs) entered into a sale & purchase agreement with Lim Low and Lim Tan & Sons to complete the sale and purchase of the land. According to Lim Low he purchased the land without any definite intention except to make money. Prices of land were rising steadily then. He bought the land with a road frontage at RM1,550 per acre as it was cheap. He bought the land in order to sell it when the price rose. He was not concerned with what was on the land.

The subject land is part of Lot 1203 Mukim of Damansara in the District of Klang. It was about 5,209 acres in area. According to the estate's records, 323 acres of this lot is **Jungle Reserve,** meaning an unplanted area, and the rest of the lot has been under oil palm cultivation since 1937. The planted areas are divided into **fields**. One of the fields is known as **Field G** which was 100 acres in 1966 but in 1968 another 6 acres which was under rubber and part of Rasak Estate was added on and replanted with oil palm.

The Jungle Reserve is bounded by a Government road on the east and a bund on the west. To the south it is bounded by Lot 1204 which was donated by the plaintiffs to the Montfort Boys Home. To the north is Field G.

According to the plaintiffs, what was sold was the Jungle Reserve. The defendants, however, contend that what was sold was 260 acres. The parties are agreed as to the boundaries of the subject land on the east, west and south. The dispute is therefore confined to part of Field 'G' to the extent of 16.8 acres on the north.

On the evidence, my findings of fact are as follows:

(a) The preamble to the sale & purchase agreement (the Agreement) states:

> And Whereas the vendor has agreed to sell and the purchasers have agreed to purchase an area of approximately 260 acres, being part of Lot 1203 and which for identification purposes delineated in red on the plan annexed hereto (hereinafter referred to as "the red area").

The annexed plan clearly shows the red area to be "Jungle Reserve 260 acres (approx.)" and "Not To Scale".

(b) This area was under virgin jungle. The reference to 20 acres elevated land and 240 acres of swamp land was guesswork as nobody knew the extent of the two types of land but it was generally agreed most of the land was swamp land.

(c) Clause 10 of the Agreement provides that if after survey, the red area is found to be less than 260 acres, then the purchase price will be reduced at the rate of RM1,550 per acre on the difference of the lesser area or if the red area was found to be more than 260 acres then the purchase price would be increased at the rate of RM1,550 per acre in respect of the excess area.

(d) In June 1975 the defendants sent contractors into Field G but were immediately stopped by the plaintiffs. The defendants left. A survey check followed. In March 1976, the defendants again entered Field G with tractors, removed 68 oil palms and levelled the land. They were again stopped by the plaintiffs who later obtained an injunction from the Court to restrain the defendants from entering Field G.

(e) The plaintiffs' instructions to the surveyors for subdivision to carry into effect Clause 2 of the Agreement so that a separate title could be issued in respect of the land sold to Lim Low clearly refer to "portion under jungle roughly 260 acres in extent": see letter of surveyors dated 22 August 1968.

(f) Lim Low's solicitor's letter of 23 September 1968 to the plaintiffs regarding delivery of vacant possession described the land sold as "Jungle Reserve Land being part of Bukit Jelutung Estate - area approximately 260 acres" the area edged in red in the plan annexed to the Agreement.

(g) The title issued to the defendants is 258.4626 acres and adjustments were made to the purchase price: see letter of plaintiffs' solicitors date 17 October 1973 to Lim Low's solicitors; and letter of defendants' solicitors dated 8 November 1973. Between the application for sub-division to the Collector of Land Revenue, Klang on 27 June 1968 and the final survey in 1971, there was an exchange of correspondence between the Land Office, other Government Departments, the surveyors and the plaintiffs. The Government wanted more precise information. The requisition for survey had to be exact. It was at this point of time that the plaintiffs' surveyors prepared a plan showing a sub-division resulting in one portion of 260 acres. The final survey followed the requisition as nearly as possible hence, according to the Director of Survey, Selangor, the job was well done and within the 5% marginal difference allowed. If the survey had excluded the planted area of Field G, the final result would have been 241.66 acres and being less than 247 acres (5% margin), the plaintiff's surveyors would have to go through a fresh requisition for survey involving eight Government Departments and a second approval of the State Authority. That would have been time-consuming, expensive and inconvenient.

The truth of the matter is that in order to obtain a portion as near to 260 acres as possible, the surveyor had no choice to encroach into Field G. If the starting point was 240 acres, then the surveyor would have been well within the 5% margin by excluding Field G. It seems to me that both Vendor and Purchaser were under the mistaken belief that the 'red area' or 'jungle reserve' was 260 acres when it was in fact a little more than 240 acres.

On the evidence, I am satisfied that the intention of the parties was a sale and purchase of the unplanted area and not a sale and purchase of 260 acres of land. I accordingly hold that 16.8 acres of Field G was not included in the Agreement entered into between the Parties on 26 June 1968.

The question then arises whether this Court can order rectification of Grant No: 20428 issued to the defendants by the excission therefrom of that part of Field G to the extent of 16.8 acres.

The defendants contend that this Court cannot do so by reason of s. 340 of the National Land Code (NLC) *viz.*

(a) The title of the defendants to the subject land is indefeasible;

(b) The exceptions to that section do not apply to the facts of this case; and

(c) Section 30 of the Specific Relief Act (SRA) cannot override s. 340 NLC.

I would at once agree with the defendants that the exceptions to s. 340 NLC do not apply to the facts of this case because mistake is not one of the exceptions. Mutual mistake, however, is a ground for rectification of any instrument in writing under s. 30 SRA. Here there was mutual mistake with regard to the intention of the parties in the sale & purchase agreement. That mistake is reflected in the Title Deed which was granted to the defendants in pursuance of the Agreement.

That brings us to the issue whether s. 30 SRA is applicable in cases where the title is indefeasible under s. 340 NLC. This issue was fully discussed and dealt with in *Oh Hiam & Ors. v. Tham Kong* [1967] 1 MLJ 65. On appeal, the Federal Court in *Tham Kong v. Oh Hiam & Ors.* [1968] 1 MLJ 44 reversed that decision but did so on findings of fact. The Privy Council in *Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159 reversed the decision of the Federal Court and restored the decision of the High Court. In that case it was contended by the defendant that s. 42 of the Land Code (now s. 340 NLC) means what it says: he being on the register his title is indefeasible and accordingly the Court cannot take it away from him, since it was neither alleged nor proved that there was fraud or misrepresentation to which he was a party, nor that his registration was obtained by forgery or by means of an insufficient or void instrument.

At p. 164 their Lordships said:

> Apart from authority their Lordships would not expect that the intervention of equity by a remedy *in personam* based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions. The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience ... The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor.

And at p. 165:

> Their Lordships accordingly reject the legal contention for the defendant that, whatever the facts, rectification is denied by the language of the relevant Land Code.

On these authorities, I hold that indefeasibility of title under s. 340 NLC does not oust the remedy under s. 30 of the Specific Relief Act.

There remains the question whether the defendants are innocent purchasers for valuable consideration which would entitle them to the protection of s. 340 NLC. Clause 8 of the Agreement provides:

> Upon the issue of a separate title or titles to the red area the vendor shall ... deliver to the Purchasers such separate title or titles together with a valid and registrable transfer of such title or titles in favour of the purchasers or their nominee or nominees ... for effectually transferring to and vesting the red area in the purchasers or their nominee or nominees.

When the time came to give effect to the aforesaid Clause, the solicitors for Lim Low and Tim Tan & Sons informed the plaintiffs by letter of 16 October 1973 as follows:

> Our clients intend nominating a limited company to take a transfer of the property the name of which will be See Ho Enterprise Sdn. Bhd.

The nominations by Lim Low and Lim Tan & Sons were made on 24 November 1973 and accepted by see Ho Enterprise Sdn. Bhd. (the defendants herein) who agreed "to undertake all outstanding liabilities under the abovementioned Sale of Land & Building Agreement". In fact the balance of the price was paid by the defendants by their cheque dated 8 November 1973.

Lim Low in his evidence said:

> Actually 4 persons shared in the purchase of the land but only 2 persons signed the agreement - viz. Lim Chin Siew and me. The other two were Lim Kim Siew and Lim Bok Eng. Then the four of us formed See Ho Enterprise Sdn. Bhd. At time of incorporation the paid-up capital of See Ho was RM450,000 divided as follows:
>
> | | |
> |---|---|
> | I & my company took | 40% |
> | Lim Tan & Sons | 35% |
> | Lim Bok Eng | 15% |
> | Lim Kim Siew | 10% |
>
> Final Title was issued in the name of See Ho Enterprise. I was a Director of the company in November 1973. Final Title received by Lim Tan & Sons.

On the evidence and in all the circumstances of this case, I find that the plaintiffs and defendants are immediate parties to the Agreement and the defendants are not really innocent Third Parties. Indeed this was not even pleaded. On the contrary the defendants at para. 3 of the Statement of Defence pleaded:

> By the said Agreement the defendant (as the nominee of Lim Low and Lim Tan & Sons Sendirian Berhad all of whom shall hereinafter be referred to collectively with the defendant as "the defendant") was to purchase 20 acres of elevated land and 240 acres of swamp land, totalling 260 acres.

I make this reference because the defendants had attempted at the trial to treat the defendants as innocent third parties and therefore came within the proviso to s. 340(3) NLC.

For the reasons stated I:

(a) Declare that an area of 16.8 acres along the northern boundary of Grant No: 20428 Lot 1216 in the Mukim of Damansara in the District of Klang is the property of the plaintiffs and has been erroneously included in the said Grant No: 20428.

(b) Declare that the defendants and all or any persons claiming through or under the defendants have no right to the ownership, occupation, possession, use or enjoyment of the said area of 16.8 acres.

(c) Order the rectification of Grant No: 20428 by the excission therefrom the cultivated area of 16.8 acres.

(d) Order the defendants to carry out and perform or join in carrying out and performing all such acts, matters and things as may be necessary to obtain the excission of the cultivated area of 16.8 acres from Grant No. 20428 including any necessary application for sub-division and for the issue of a new title to the said area of 16.8 acres and the transfer of such new title to the plaintiffs.

(e) Order that in default of the defendants carrying out or performing or joining in carrying out and performing any act, matter or thing necessary to obtain the excission of the cultivated area of 16.8 acres from Grant No. 20428 the Senior Assistant Registrar, High Court, Kuala Lumpur do carry out and perform or do join in carrying out and performing any such act, matter or thing in the name of and on behalf of the defendants and that he do sign on behalf of the defendants all necessary and proper documents to lead to the excission of the said 16.8 acres from Grant No. 20428, the obtaining of a new document of title thereto and the transfer of such new title to the plaintiffs.

(f) Order the plaintiffs to pay all costs of the aforesaid rectification, subdivision and issue of a new title.

(g) Order the plaintiffs to refund to the defendants the purchase price in respect of 16.8 acres at the rate of RM1,550 per acre.

In view of the fact that the mistake was mutual, I dismiss the claim for damages and the counter-claim; and that each party pays its own costs.

Also found at [1987] 1 CLJ 275